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No. 06-1478

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In The

Supreme Court of the United States

JACK E. ALDERMAN,

Petitioner,

v.

WILLIAM TERRY, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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QUESTIONS PRESENTED

1.

Whether the federal courts' fact-specific application of *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny, in rejecting Petitioner's claim that trial counsel was ineffective during Petitioner's resentencing trial with respect to the investigation and presentation of mitigating evidence, fails to present any issue warranting certiorari review by this Court?

2.

Whether this Court should deny certiorari as to Petitioner's claim that the Eleventh Circuit allegedly "failed to apply" *Strickland v. Washington*, based on Petitioner's unsupported assertion that *Strickland* places a burden on trial counsel to justify the reasonableness of their sentencing phase investigation and strategy?

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BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

PART ONE

STATEMENT OF THE CASE

As the Eleventh Circuit noted, this case has "extended over thirty-two years" and has a procedural history which is "extensive and complex." *Alderman v. Terry*, 468 F.3d 775, 777 (11th Cir. 2006). Therefore, Respondent offers the following procedural history, subdivided into the various stages of Petitioner's trial, resentencing trial and state and federal post-conviction proceedings.

(a) Original Trial (1974-1975)

On June 14, 1975, Petitioner, Jack E. Alderman, was originally convicted in the Superior Court of Chatham County, Georgia, for the 1974 murder of his wife. Petitioner was sentenced to death for this offense on June 14, 1975.

(b) Original Direct Appeal to the Georgia Supreme Court and Denial of Certiorari by this Court (1975-1979)

On June 27, 1978, the Georgia Supreme Court affirmed his conviction and death sentence in *Alderman v. State*, 241 Ga. 496 (1978), *cert. denied*, 439 U.S. 991 (1978), *r'hrg denied*, 439 U.S. 1122 (1979).

(c) First State Habeas Corpus Proceeding; Denial of Application for a Certificate of Probable Cause by the Georgia Supreme Court and Denial of Certiorari by this Court (1979-1980)

Petitioner then challenged his conviction and death sentence by filing a petition for state habeas corpus relief. On June 4, 1979, the state habeas corpus court conducted a hearing and on that same date denied the application for habeas corpus relief. The Georgia Supreme Court denied Petitioner a certificate of probable cause to appeal. This Court denied Petitioner's petition for a writ of certiorari in *Alderman v. Balkcom*, 444 U.S. 1103, *r'hrg denied*, 445 U.S. 973 (1980).

(d) First Application for Federal Habeas Corpus Relief and Appeal to the Fifth Circuit (1980-1983)

Petitioner then filed an application for federal habeas corpus relief in the United States District Court for the Southern District of Georgia on June 27, 1980. As to this first federal habeas corpus petition, the federal habeas corpus court reviewed two issues raised by Petitioner and granted federal habeas corpus relief to Petitioner as to both Petitioner's conviction and death sentence. *Alderman v. Austin*, 498 F. Supp. 1134 (S.D. Ga. 1980).

On appeal from the granting of federal habeas corpus relief, the United States Court of Appeals for the Fifth Circuit affirmed the grant of relief as to Petitioner's death sentence, but reversed the grant of relief as to his conviction. *Alderman v. Austin*, 663 F.2d 558 (5th Cir. Unit B 1981); *Alderman v. Austin*, 695 F.2d 124 (5th Cir. Unit B 1983) (*en banc*).

(e) Resentencing Trial (1984)

Petitioner's resentencing trial was conducted on March 26-31, 1984 in the Superior Court of Chatham County, Georgia. At his resentencing trial, Petitioner was represented by trial counsel G. Terry Jackson and Michael Schiavone. On April 1, 1984, Petitioner was again sentenced to death. Represented by trial counsel, Petitioner filed a motion for new trial and an amendment thereto, which were denied on August 27, 1984.

(f) Appeal from Re-imposition of the Death Sentence and Denial of Certiorari by this Court (1984-1985)

Trial counsel also represented Petitioner on direct appeal to the Georgia Supreme Court. The Georgia Supreme Court affirmed Petitioner's newly imposed death sentence on February 28, 1985 in *Alderman v. State*, 254 Ga. 206 (1985). Petitioner filed a petition for writ of certiorari in this Court, which was denied on October 15, 1985 in *Alderman v. Georgia*, 474 U.S. 911, 106 S.Ct. 282 (1985). Petitioner then filed a petition for rehearing, which was also denied by this Court on November 18, 1985 in *Alderman v. Georgia*, 474 U.S. 1000 (1985).

(g) State Habeas Corpus Proceedings Challenging Re-imposed Death Sentence; Dismissal; Appeal to the Georgia Supreme Court and Denial of Certiorari by this Court (1986-1988)

Petitioner then filed a state habeas corpus petition in the Superior Court of Butts County, Georgia, on February 6, 1986. An amended petition for writ of habeas corpus was filed on June 16, 1987 and a second amended habeas corpus petition was filed on June 25, 1987. An evidentiary

hearing was conducted on June 29, 1987. The state habeas corpus court dismissed the petition on September 10, 1987, holding that all of Petitioner's claims were barred from review under principles of procedural default or *res judicata*.

On October 7, 1987, Petitioner filed an application in the Georgia Supreme Court for a certificate of probable cause to appeal the denial of his state habeas corpus petition. The Georgia Supreme Court denied that application on October 28, 1987. Petitioner then filed a petition for writ of certiorari in this Court, which was denied on March 7, 1988, in *Alderman v. Georgia*, 485 U.S. 943 (1988).

(h) Federal Habeas Corpus Proceedings Challenging Re-imposed Death Sentence; Denial of Petition and Appeal from Denial of Motion to Alter or Amend (1988-1990)

On June 20, 1988, Petitioner filed an application for federal habeas corpus relief in the United States District Court for the Southern District of Georgia. The federal habeas corpus court denied Petitioner relief on June 6, 1989. Subsequent to the entry of judgment, both Petitioner and Respondent filed motions to alter or amend. On June 22, 1989, the federal habeas corpus court entered an order denying Petitioner's motion. While Respondent's motion to alter or amend was still pending, Petitioner filed a notice of appeal. On August 10, 1990, the Eleventh Circuit dismissed the appeal of Petitioner, finding it lacked jurisdiction based upon Respondent's pending motion. *Alderman v. Zant*, 912 F.2d 1469 (11th Cir. 1990).

(i) Remand to the Federal Habeas Corpus Court; Order Granting In Part and Denying In Part, Respondent's Motion to Alter or Amend; Appeal and Dismissal of Appeal for Lack of Jurisdiction (1990-1991)

After the case was remanded to the federal habeas corpus court, the federal habeas court entered an order which was filed on September 20, 1990, granting in part and denying in part, Respondent's motion to alter or amend. Petitioner then filed an appeal challenging the decision of the federal habeas corpus court, at the same time challenging the Eleventh Circuit's jurisdiction to consider his own appeal due to the federal habeas court's failure to rule on an issue. On December 27, 1991, the Eleventh Circuit dismissed the appeal for lack of jurisdiction over a claim concerning the traverse jury.

(j) Federal Evidentiary Hearing; Denial of Federal Petition; Appeal to the Eleventh Circuit and Denial of Certiorari by this Court (1992-1994)

In the Eleventh Circuit's order of December 27, 1991, dismissing Petitioner's appeal, the Eleventh Circuit ordered that the federal habeas corpus court conduct a hearing on certain specified claims. This federal evidentiary hearing was conducted on May 18, 1992. Following the evidentiary hearing, the federal habeas court entered an order denying the petition on all grounds on June 22, 1992. On October 23, 1992, the federal habeas court granted Petitioner a certificate of probable cause to appeal. The Eleventh Circuit affirmed the decision of the district court and denied habeas corpus relief on April 14, 1994. *Alderman v. Zant*, 22 F.3d 1541 (11th Cir. 1994). Petitioner then filed a petition for a writ of certiorari in

this Court, which was denied on December 12, 1994 in *Alderman v. Thomas*, 513 U.S. 1061 (1994).

(k) Second State Habeas Corpus Petition, Amended Petition, Evidentiary Hearing and Denial of Relief (1994-1999)

Petitioner filed a second state habeas corpus petition in the Superior Court of Butts County, Georgia on December 22, 1994. An amended petition for writ of habeas corpus was filed on March 29, 1999. An evidentiary hearing was conducted on May 5-6, 1999. At this hearing, both of Petitioner's trial attorneys provided testimony as to their representation of Petitioner. The state habeas corpus court denied Petitioner's state habeas corpus petition, as amended, on December 29, 1999.

(l) Appeal from Denial of Second State Habeas Corpus Petition and Denial of Certiorari by this Court (2000-2002)

On February 25, 2000, Petitioner filed an application for a certificate of probable cause to appeal the denial of his state habeas corpus petition in the Georgia Supreme Court. The Georgia Supreme Court denied that application on January 10, 2002. Petitioner then filed a petition for writ of certiorari in this Court, which was denied on October 21, 2002 in *Alderman v. Head*, 537 U.S. 995 (2002).

(m) Application for Federal Habeas Corpus Relief (2003-2004)

Petitioner filed his application for federal habeas corpus relief in the United States District Court for the

Southern District of Georgia on February 10, 2003. Respondent filed his answer and a brief in support of the answer on March 28, 2003.

The federal habeas corpus court denied and dismissed Petitioner's petition for writ of habeas corpus on July 19, 2004. Petitioner filed a motion to alter or amend judgment on August 2, 2004, which was denied on August 3, 2004.

(n) Appeal to the Eleventh Circuit from the Denial of Federal Habeas Corpus Relief (2004-2006)

Petitioner filed a notice of appeal from the denial of habeas corpus relief on September 2, 2004. Petitioner's motion for a certificate of appealability was denied by the federal habeas corpus court on October 4, 2004.

On November 15, 2004, the Eleventh Circuit denied Petitioner's application for a certificate of appealability. On June 27, 2005, following an application to the *en banc* court for a certificate of appealability, the Eleventh Circuit granted Petitioner's certificate of appealability as to "whether Alderman's trial attorneys denied him the effective assistance of counsel in the penalty phase of his sentencing proceedings by failing to investigate and present to the jury his social-history background." *Alderman v. Terry*, 468 F.3d 775 (11th Cir. 2006).

The Eleventh Circuit affirmed the denial of federal habeas corpus relief to the Petitioner in *Alderman v. Terry*, 468 F.3d 775, 777 (11th Cir. 2006). The Eleventh Circuit affirmed the denial of federal habeas corpus relief to Petitioner as to his claim of ineffective assistance of counsel at the resentencing trial by finding the following:

> We conclude that the state court's application of Strickland was not objectively unreasonable, and that defense counsel's life-history investigation and presentation of mitigating evidence did not constitute ineffective assistance of counsel under *Strickland*. We also conclude that defense counsel's failure to present the evidence habeas counsel proffered at the evidentiary hearing did not constitute an error so "serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Alderman v. Terry, 468 F.3d 775, 793 (11th Cir. 2006).

In the instant petition for a writ of certiorari, Petitioner seeks review of the federal courts' fact-specific application of this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), in rejecting Petitioner's resentencing trial ineffectiveness claim.

PART TWO

STATEMENT OF THE FACTS

In its 1978 opinion, the Georgia Supreme Court summarized the evidence presented at Petitioner's trial as follows:

> On the afternoon of September 19, 1974, the appellant approached John A. Brown, a close friend, and asked for his assistance in the killing of appellant's wife, Barbara J. Alderman. The appellant told Brown that if he helped he would split one-half the proceeds of his wife's life insurance policy with him. At first Brown thought Alderman was only "kidding," but Alderman's persistence convinced Brown that he was serious.

Two days later the appellant called Brown and asked him to come over to his apartment in Chatham County. When Brown arrived the appellant handed him a 12-inch crescent wrench and told him, "it had to be done . . . all you have to do is hit her with the wrench." Brown hesitated, but after the appellant threatened him with a gun, Brown proceeded into the dining room where he struck Mrs. Alderman in the back of the head with the wrench. Mrs. Alderman screamed and ran into the living room where she was tackled by her husband. He held her down, and with Brown's assistance, attempted to strangle her. After she passed out, the appellant asked Brown if he thought she was dead. When Brown said "yes" the appellant said "well, stay here with her while I go open the bathroom door." Browned asked what for and the appellant replied "I'm going to drag her in there and drown her . . . I want to make sure that she doesn't do anything." Mrs. Alderman's body was then dragged into the bathroom and placed in the bathtub.

The appellant started running water in the tub while Brown attempted to clean bloodstains from the carpet where Mrs. Alderman's body had fallen. Brown then went back into the bathroom and saw Mrs. Alderman in the bathtub with water just over her face.

Brown and the appellant changed clothes and left the apartment. They stopped at a Piggly-Wiggly store where Alderman got $100 which he gave Brown for his help. From there they went to a bar and started drinking. At around 10 p.m. Brown and the appellant returned to the apartment. Mrs. Alderman's body was still in the bathtub, but only a small amount of water remained in the bottom of the tub. They picked her up out

the tub, put her body on a quilt and rolled her up in it. Her body was then placed in the trunk of her car. Brown drove the car while Alderman followed behind on a motorcycle. They drove to Rincan, Georgia, in Effingham County. When they arrived at Dasher Creek, Mrs. Alderman's body was taken out of the trunk and put in the driver's seat of her automobile. Brown put the vehicle in drive and released the emergency brake. The car rolled into the creek. Before leaving, Brown opened the door to permit the body to fall out. The two then departed on the motorcycle.

At trial the appellant testified in his own behalf. He denied having anything to do with the death of his wife. He testified that on the night in question he and his wife had engaged in a conversation concerning her inability to become pregnant. She had told him that because she was only half a woman she was going to leave him to allow someone else to better fill her position. She grabbed her pocketbook and went out the back door. Appellant testified that at approximately 7 p.m. he left the apartment and caught a bus to get a drink. He returned home at approximately 10 p.m. but his wife was not at home. He then decided to go to Rincan, where Mrs. Alderman's grandmother resided, in order to apologize to his wife. The appellant testified that when he crossed the bridge at Dasher Creek, he saw his wife's car in the creek. The door was open and his wife's body was lying under water. The appellant testified that she was dead. When he heard a car coming he got on his motorcycle and returned to a bar in Savannah. Appellant testified that he did not know why he had left his wife's body in the creek; that he recalled nothing of his trip

> back to Savannah; and, the fact that his wife was dead had completely left his mind. Appellant testified that he first realized the full facts surrounding his wife's death after being treated by a psychiatrist who was able to bring back his memory as to the events of that night. He stated that after being treated he realized that fear had caused him to leave his wife's body in the creek because he knew her family would blame him for her death.

Alderman v. State, 241 Ga. 496, 497-499 (1978).[1]

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THE FEDERAL COURTS' FACT-SPECIFIC APPLICATION OF *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984) AND ITS PROGENY, IN REJECTING PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT PETITIONER'S RESENTENCING TRIAL, FAILS TO PRESENT ANY ISSUE WARRANTING CERTIORARI REVIEW BY THIS COURT.

The majority of this petition for a writ of certiorari consists of Petitioner's re-argument of his claim that resentencing trial counsel rendered ineffective assistance, which was rejected by the state and federal courts under the standard of *Strickland v. Washington*, 466 U.S. 668

[1] In the Eleventh Circuit's opinion, the Circuit Court included an excerpt from an earlier statement of facts in a prior opinion. *See Alderman v. Terry*, 468 F.3d 775, 777 (11th Cir. 2006), citing *Alderman v. Zant*, 22 F.3d 1541, 1544-1546 (11th Cir. 1994).

(1984). Petitioner essentially urges this Court to act as a fact-finder and conduct a *de novo* review of his claim that Petitioner's two attorneys representing him during his resentencing trial rendered ineffective assistance by failing to investigate and present additional mitigating evidence.

Each court reviewing Petitioner's resentencing trial ineffective assistance claim conducted a thorough *Strickland* analysis using *Strickland's* touchstone of an "objective standard of reasonableness." *Darden v. Wainwright*, 477 U.S. 168, 184 (1986), citing *Strickland v. Washington*, 466 U.S. 668 (1984) (petitioner must show that "counsel's representation fell below an objective standard of reasonableness.")

The Eleventh Circuit began its analysis of Petitioner's resentencing trial ineffectiveness claim by referencing this Court's interpretation of the AEDPA principles governing a federal habeas corpus court's review of a state court decision. The Eleventh Circuit specifically observed that, "the Supreme Court provided guidance about how to interpret § 2254(d) in *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)." *Alderman v. Terry*, 468 F.3d 775, 791 (11th Cir. 2006).

The Eleventh Circuit proceeded to specifically acknowledge *Strickland's* two-prong test for reviewing ineffectiveness claims and the requirement that the Petitioner establish both prongs of *Strickland* "to mount successfully an ineffective assistance of counsel claim," in order to obtain habeas corpus relief as to his ineffectiveness claim. Citing *Strickland*, 466 U.S. at 687, the Eleventh Circuit acknowledged that, "there is not one 'correct'

way to provide effective assistance." *Alderman v. Terry*, 468 F.3d 775, 792 (11th Cir. 2006).

The Eleventh Circuit appropriately listed the various important elements of a *Strickland* ineffective assistance analysis including eliminating "hindsight" from the analysis; requiring a consideration of "the sum total of [counsel's] efforts" and recognizing that there is "no absolute duty to investigate particular facts or a certain line of defenses." *Alderman v. Terry*, 468 F.3d 775, 792 (11th Cir. 2006) (cites omitted).

The Eleventh Circuit also followed this Court's guidance in *Strickland*, as to a reviewing court's proper analysis of a claim that trial counsel was ineffective at the sentencing phase due to the failure to present sufficient mitigating evidence. *Alderman v. Terry*, 468 F.3d. 775, 792 (11th Cir. 2006).

The Eleventh Circuit rejected Petitioner's contentions that, "the state habeas court unreasonably applied *Strickland*'s standard as to the deficient performance prong of his ineffectiveness claims," and that the state habeas court based its decision on "unreasonable determinations of fact in light of the evidence before the court." *Alderman v. Terry*, 468 F.3d 775, 792-793 (11th Cir. 2006).

In finding that, "counsel was not required to examine every possible legal strategy or defense available," the Eleventh Circuit relied on *Strickland's* focus which emphasizes that a reviewing court should consider "whether the investigation supporting counsel's decision was itself reasonable." *Alderman v. Terry*, 468 F.3d 775, 793 (11th Cir. 2006), citing *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). However, the Eleventh Circuit also correctly found

that *Strickland* did not mandate that there is any "magic" number of witnesses to interview or documents to review. *Alderman v. Terry*, 468 F.3d 775, 792 (11th Cir. 2006).

Citing *Strickland*, 466 U.S. at 689, the Eleventh Circuit noted the requirement that Petitioner overcome a strong presumption that any "action" of trial counsel constitutes "sound strategy." *Alderman v. Terry*, 468 F.3d 775, 792 (11th Cir. 2006).

The Eleventh Circuit reviewed the state habeas corpus court's decision rejecting Petitioner's sentencing phase ineffective assistance claim and found the following:

> We conclude that the state court's application of *Strickland* was not objectively unreasonable, and that defense counsel's life-history investigation and presentation of mitigating evidence did not constitute ineffective assistance of counsel under *Strickland*. We also conclude that defense counsel's failure to present the evidence habeas counsel proffered at the evidentiary hearing did not constitute an error so "serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Alderman v. Terry, 468 F.3d 775, 793 (11th Cir. 2006).

After examining the totality of the circumstances of Petitioner's resentencing trial in light of *Strickland* principles, including trial counsels' testimony, the guidance given to the witnesses who did testify,[2] the mitigation

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[2] As noted by the Eleventh Circuit there was mitigating evidence presented on Petitioner's behalf at the resentencing trial. "As for mitigating evidence, Jackson and Schiavone called as character witnesses eleven corrections officers, seven of Alderman's friends, and

(Continued on following page)

testimony actually presented at trial and the "lingering doubt" strategy adopted by trial counsel, the Eleventh Circuit found that Petitioner had not demonstrated that trial counsels' performance during the resentencing trial was deficient and had also failed to establish the requisite prejudice.

The Eleventh Circuit reached the following conclusions based on its review of the complete record, including both the resentencing trial transcript and the state habeas corpus evidentiary hearing:

> Often inherent in the choice to pursue one strategy is a latent decision not to engage in a different tactic or line of defense. While Schiavone responded that he could not think of a tactical reason for not pursuing more detailed responses from his witnesses about Alderman's life history, that is simply a reflection of the cardinal emphasis on the lingering doubt strategy. Even assuming that his attorneys were not fully aware of the scope of permissible mitigating evidence, Alderman would need to show that the approach they ultimately took "would not have been used by professionally competent counsel." *Harich v. Dugger*, 844 F.2d 1464, 1470 (11th Cir. 1988) (abrogated on other grounds). Given the state court's findings regarding counsel's skill, knowledge, and performance, coupled with the court's finding that "counsel performed both reasonably and effectively in their representation of Alderman," *Alderman v. Head*, No. 94-V-720 at 30 (Super. Ct. of Butts County Dec. 29, 1999), we cannot say that

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five of Alderman's previous employers or co-workers." *Alderman v. Terry*, 468 F.3d 775, 789 (11th Cir. 2006).

> Alderman was denied his constitutional right to competent representation.
>
> Addressing *Strickland's* second prong, prejudice, the state habeas court concluded that defense counsel's failure to introduce life-history evidence to the extent habeas counsel contend the Constitution requires caused Alderman no prejudice. The district court, reviewing that conclusion, agreed. Assuming, for the sake of argument, that counsel's performance failed to meet *Strickland's* first prong, we readily conclude on the record before us that "counsel's errors were [not] so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687, 104 S. Ct. at 2064.

Alderman v. Terry, 468 F.3d 775, 795 (11th Cir. 2006).

Petitioner's mere disagreement with the Eleventh Circuit's proper AEDPA review of Petitioner's resentencing trial ineffective assistance claim, applying this Court's well-settled *Strickland* test, fails to warrant this Court's exercise of its certiorari jurisdiction. This Court has repeatedly stated that, "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925) and *Texas v. Mead*, 465 U.S. 1041 (1984). This Court should decline to review the specific facts of Petitioner's case in light of the Eleventh Circuit's proper application of *Strickland,* appropriately conducting a totality of the circumstances review.

The fact that Petitioner questions the judgment of the Eleventh Circuit and the state and federal habeas corpus courts in rejecting Petitioner's claim that trial counsel at his resentencing trial were ineffective, also fails to support the grant of certiorari in this case. This Court emphasized in such cases as *Ross v. Moffitt*, 417 U.S. 600, 616-617

(1974), that this Court's certiorari review is discretionary and "depends on numerous factors other than the perceived correctness of the judgment we are asked to review."

This Court should deny certiorari in Petitioner's case based on the mere allegation by Petitioner that the Eleventh Circuit incorrectly rejected Petitioner's sentencing phase ineffectiveness claim. This Court should also decline Petitioner's invitation to have this Court conduct a *de novo* review of the specific facts proffered as alleged support for his claim of resentencing trial ineffective assistance due to trial counsel's "failure" to investigate and present additional mitigating evidence.

II. THIS COURT SHOULD DENY CERTIORARI AS TO PETITIONER'S CLAIM THAT THE ELEVENTH CIRCUIT ALLEGEDLY "FAILED TO APPLY" *STRICKLAND*, BASED ON PETITIONER'S UNSUPPORTED ASSERTION THAT *STRICKLAND* PLACES A BURDEN ON TRIAL COUNSEL TO JUSTIFY THE REASONABLENESS OF THEIR SENTENCING PHASE INVESTIGATION AND STRATEGY.

Petitioner urges this Court to grant certiorari to review the decision of the Eleventh Circuit, which decision he contends "failed to apply" *Strickland* in reviewing his sentencing phase ineffectiveness claim. (Petition, p. 20). However, Petitioner bases the alleged incorrectness of the Eleventh Circuit's decision on his unfounded assertion that there is a burden of proof on the trial attorneys who are alleged to be ineffective to justify their actions, which purported burden is not contained in this Court's decision in *Strickland* or its progeny.

Without reference to any portion of *Strickland* or to any binding authority from this Court, Petitioner creates a burden on the attorneys alleged to be ineffective to defend their actions. Petitioner alleges that, "the Eleventh Circuit's standard thus relieved counsel of the obligation this Court placed squarely on his [trial counsel's] shoulders – to demonstrate that this failure to investigate or present this mitigating evidence was based on a reasoned strategic or tactical decision." (Petition, p. 20).

The placing of a burden on trial counsel to prove that they made a strategic decision is not required by *Strickland*, but, in fact, is contrary to *Strickland*'s "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"; *Strickland*'s acknowledgement that, "there are countless ways to provide effective assistance in any given case," and *Strickland*'s admonition that, "the object of an ineffectiveness claim is not to grade counsel's performance." *Strickland v. Washington*, 466 U.S. 668, 689, 697 (1984).

Contrary to Petitioner's assertion, *Strickland* does not direct that trial counsel defend themselves, but rather *Strickland* specifically instructs that a reviewing court examine trial counsel's conduct by judging, "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

Of equal significance in rejecting Petitioner's newly-created "burden of proof" on the counsel alleged to be ineffective to justify their trial strategy, is the fact that neither *Strickland* nor the AEDPA places any burden of proof on the attorney alleged to be ineffective. *Strickland* places the burden of proof squarely on a petitioner

attempting to establish ineffective assistance to demonstrate trial counsel's deficient performance and resulting prejudice.

Although Petitioner seeks to obtain this Court's review by alleging that the Eleventh Circuit failed to follow *Strickland*, an examination of Petitioner's contentions clearly shows, in clear contravention of *Strickland* principles, that Petitioner is attempting to create a burden on trial counsel to make a hindsight analysis of their representation and attempt to justify their actions, investigation and strategy.

Rather than performing a superficial analysis of Petitioner's ineffectiveness claim, based solely on an out-of-context statement of one of Petitioner's trial attorneys, the Eleventh Circuit properly reviewed the totality of the circumstances of Petitioner's case. Applying well-settled *Strickland* principles, the Eleventh Circuit properly utilized AEDPA principles in rejecting Petitioner's claim that trial counsel were ineffective during Petitioner's resentencing trial and therefore, Petitioner fails to present any basis for granting certiorari review of the Eleventh Circuit's decision.

CONCLUSION

WHEREFORE, for all of the above and foregoing reasons, Respondent prays that this Court decline to exercise its certiorari jurisdiction and deny the instant petition for a writ of certiorari.

Respectfully submitted,

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